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No. 83-979

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD LORRIN CRONN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, a white male, had no standing to seek dismissal of the indictment returned against him based upon alleged discrimination against women and minority persons in the selection of grand jury forepersons that denied them equal protection of the laws, and properly declined to consider an alternative due process claim that petitioner had not presented in the district court or upon appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-28A) is reported at 717 F.2d 164. The opinion of the district court (Pet. App. 29A-38A) is reported at 559 F. Supp. 124.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1983 (Pet. App. 39A-40A). A petition for rehearing was denied on October 27, 1983 (see Pet. App. 41A-42A). The petition for a writ of certiorari was filed on November 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After denial of his pretrial motions to dismiss the indictment and a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to commit mail fraud and wire fraud in violation

of 18 U.S.C. 371, four counts of mail fraud, in violation of 18 U.S.C. 1341, and three counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to consecutive terms of imprisonment of five years on the conspiracy count and two years on one wire fraud count, together with concurrent two year terms of imprisonment on each of five other completed offense counts. On the remaining count, petitioner was sentenced to five years' probation to run consecutively with to other sentences. Petitioner was fined $10,000 on the conspiracy count and $1,000 on each of the remaining counts. The court of appeals affirmed (Pet. App. 1A-28A).

1. The evidence, the sufficiency of which is not in dispute (and which was not challenged below), showed that in 1979 petitioner was the president of World Travel, Inc., a firm that sold Las Vegas vacation packages by telephone from Dallas, Texas (Tr. 292-300, 375, 390-396). At first the travel packages sold by World Travel were assembled by petitioner's co-defendant Steven Reiter, who resided in Las Vegas. In January 1980, Reiter was succeeded in this role by co-defendant Billy D. Kegley, who at the time was operating a vacation club in Tarzana, California (Tr. 2333-2349).

In mid-1980, petitioner increased his business dramatically by switching from random telephone solicitation to the use of "speedgrams" that were delivered by mail. Salespersons were hired to reply to individuals who inquired about the vacation packages by telephone. Included in the sales presentation to customers were misrepresentations concerning the value and conditions of the vacation package and the availability of refunds. Dissatisfied customers complained to petitioner and ultimately to the Postal Service. On January 13, 1981, the Postal Service filed a civil action against World Travel. On March 11, 1981, a consent decree was entered in that action that required World Travel to give refunds to complaining customers. Tr. 1033-1037; Gov't Exh. C26.

After the Postal Service filed its complaint, petitioner changed the name of his company to "Passport to Pleasure Vacations of Texas." At this time petitioner also resumed using Reiter as his source for vacation packages (Tr. 1038-1039, 1050-1051, 1189-1191). Petitioner's sales operation remained the same: mailing of misleading promotional material, and use of sales personnel to make false promises and misrepresentations to potential customers who responded (Tr. 642, 943-982, 1962-1986, 1989-2002). Petitioner destroyed requests for refunds without honoring them (Tr. 597, 643-678, 982-1021).

On July 25, 1981, Reiter notified petitioner that he would no longer furnish vacation packages to him. Petitioner nonetheless continued to offer Reiter's vacation package certificates to customers for several weeks and failed to notify customers that the certificates would not be honored in Las Vegas. Tr. 597-601, 1213-1219. On August 10, 1981, petitioner ceased selling the Reiter packages and entered into a new agreement with Kegley. Two months later Kegley cancelled that agreement because petitioner's sales personnel were making material misrepresentations to customers. Despite the cancellation, petitioner continued to sell and mail the worthless Kegley vacation packages. Tr. 1068, 1072-1078.

Faced with mounting complaints, petitioner moved to Arizona. He left behind two employees to carry on the operation. Petitioner remained in contact with the employees by telephone without disclosing his whereabouts. Advised of customer complaints, petitioner directed that they be ignored. One employee severed her ties to petitioner in November 1981, while the other continued until January 1982, when petitioner shut down his operation (Tr. 420-440, 445-466).

2. a. Prior to trial, petitioner, a white male, filed a motion for access to the district court's grand jury selection records, seeking support for his claim that members of cognizable minority groups and women had historically been underrepresented among grand jury forepersons in the Northern District of Texas. Petitioner asserted in the district court that he had been denied equal protection of the laws (see Pet. App. 4A). The district court ruled that petitioner had standing to assert such a complaint even though he was not a member of any group alleged by him to have been underrepresented among grand jury forepersons (*id.* at 30A-33A). The district court denied petitioner's request for access to the grand jury selection records, however, concluding that petitioner could in no event prevail upon his challenge to the indictment. The court reasoned that because the duties of the foreperson are ministerial, and the foreperson must be selected from among the members of a properly selected grand jury, a criminal defendant has no right to challenge an indictment on grounds pertaining to the selection of a foreperson. Pet. App. 33A-38A. Following his trial and conviction, petitioner appealed.

b. The court of appeals affirmed petitioner's conviction without reaching the question whether a criminal defendant may challenge his indictment by alleging discrimination affecting only the selection of a foreperson from among the members of a properly constituted grand jury (see Pet. App. 4A). The court of appeals observed that, in the district court and upon appeal, petitioner's claim was predicated entirely upon the equal protection component of the Fifth Amendment Due Process Clause, and that no other claim of denial of due process had been made at any time (Pet. App. 4A-5A). The court of appeals concluded that while petitioner might have had standing to challenge the indictment upon due process grounds, as a nonmember of the allegedly underrepresented groups, he had no standing to press an equal protection challenge (*id.* at 6A-24A).

The court of appeals observed that, to the extent *Peters* v. *Kiff*, 407 U.S 493 (1972) (opinion of Marshall, J.), recognized the standing of a white defendant to complain of exclusion of black citizens from the grand or petit jury, that ruling related only to the due process claim addressed in *Peters* (Pet. App. 9A-16A). And the court of appeals noted that *Rose* v. *Mitchell*, 445 U.S. 543, 565 (1979), and *Castaneda* v. *Partida*, 430 U.S. 482, 492 (1977), which both address equal protection claims, employ language that suggests that such claims arise only in favor of members of a group alleged to have been discriminated against in jury selection (Pet. App. 17A-19A). The court also explained that to accord standing to petitioner would be inconsistent with the gravamen of an equal protection claim (Pet. App. 19A-20A):

> The essence of an equal protection claim is that other persons similarly situated as is the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected. * * * Equal protection claims are of their nature personal, to be stated in terms of one's own rights or those of a class in which one claims membership; logically, [petitioner] lacks standing to complain of unequal treatment accorded other persons or classes of which he is not a member.

The court of appeals also concluded that there is no special "nexus" or "relationship" between petitioner and the persons whose rights allegedly have been infringed that might justify allowing him vicariously to assert their rights (Pet. App. 21A-24A).

ARGUMENT

Petitioner does not quarrel directly with the court of appeals' conclusion that a nonmember of a group that allegedly has been discriminated against in the selection of grand jury forepersons lacks standing to present an equal

protection claim. Rather, he simply asserts (Pet. 12) that the court of appeals took too narrow a view of his claim, and that the decision below in any event conflicts with decisions of the Eleventh Circuit in *United States* v. *Cross*, 708 F.2d 631 (1983), petition for cert. pending, No. 83-1037; *United States* v. *Holman*, 680 F.2d 1340 (1982) and *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982). Petitioner's claim is unsupported by the record, or any decision of this Court. Moreover, contrary to his assertion, the standing ruling of the court below is consistent with the only other decision of a court of appeals that explicitly addresses the issue.

1. a. No decision of this Court indicates that a non-member of a class that has allegedly been discriminated against in the selection of grand jury forepersons may raise an equal protection claim founded upon such discrimination. The court of appeals' careful examination (Pet. App. 9A-16A) of *Peters* v. *Kiff*, 407 U.S. 493 (1972), upon which petitioner relies (Pet. 11-14), properly led it to conclude that that case does not support petitioner's standing to raise the equal protection claim.

In *Peters*, a case decided without an opinion for the Court, Justice Marshall, joined by Justices Douglas and Stewart, concluded (407 U.S. at 504):

> [W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Although an equal protection claim was also presented, Justice Marshall expressly declined to reach that issue. 407 U.S. at 496 and 497 n.5. See also *id.* at 509 (Burger, C.J., dissenting). Moreover, the conclusion stated in the lead

opinion was based upon the impact of exclusion of minority members upon the integrity of the judicial process, rather than upon any discriminatory effect suffered by the *Peters* defendant, who was white. *Id.* at 497, 501-504. Justice White, joined by Justices Brennan and Powell, concurred in the judgment, relying primarily, if not exclusively, upon 18 U.S.C. 243, which provides that racial discrimination in jury selection is a crime (407 U.S. at 505-507).

Peters therefore does not support petitioner's equal protection claim. The Court considered only a due process claim resting upon a defective selection procedure for grand and petit jury members that was determined to destroy the integrity of the factfinding process and to violate the criminal proscription of 18 U.S.C 243. Here, petitioner does not present any due process claim and does not allege a violation of 18 U.S.C 243, which provides in terms that "[n]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States * * * on account of race, color, or previous condition of servitude * * *."

No other decision of this Court suggests that a defendant who is not a member of a class of persons allegedly underrepresented among grand jurors or grand jury forepersons may seek dismissal of an indictment on equal protection grounds. *Rose* v. *Mitchell*, 443 U.S. 545 (1979) and *Castaneda* v. *Partida*, 430 U.S. 482 (1977), address the equal protection claims of members of the allegedly underrepresented class. As the court below noted (Pet. App. 17A-19A), in *Castaneda* this Court employed language that strongly suggested that standing to present an equal protection claim is limited to persons who are members of the class allegedly subjected to discrimination (430 U.S. at 492, quoting *Hernandez* v. *Texas*, 347 U.S. 475, 477 (1954)):

> This Court has long recognized that "it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded * * *."

Similar language was employed most recently in *Rose* v. *Mitchell*, 443 U.S. at 565.

b. The decision of the court of appeals correctly applies the foregoing decisions of this Court, as well as the decision in *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972), which strongly suggests that a defendant not a member of an underrepresented class lacks standing to pursue an equal protection challenge to an indictment based upon grand jury selection procedures. More generally, the court of appeals properly emphasized (Pet. App. 21A-24A) that denial of standing to raise an equal protection claim here is consistent with the decisions of this Court recognizing that a party ordinarily may not raise the constitutional rights of strangers. *E.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

2. Contrary to petitioner's contention (Pet. 9), the decision of the court of appeals does not create a conflict with the Eleventh Circuit's decisions in *Cross*, *Holman* and *Perez-Hernandez* that should be resolved at this time. To be sure, in *Perez-Hernandez* a panel of the Eleventh Circuit, relying upon *Peters* v. *Kiff*, *supra*, held that a male of Hispanic descent had standing to raise an equal protection challenge to his indictment based upon alleged discrimination against blacks and women in the selection of grand jury forepersons. The panel recognized that language in *Castaneda* v. *Partida* and *Rose* v. *Mitchell* suggested a contrary view, but rejected that result, reasoning that "[t]he holding in *Peters* v. *Kiff* is clear and unambiguous and has

never been expressly overruled" (672 F.2d at 1386 (footnote omitted)). Although skeptical of the ruling in *Perez-Hernandez*, a different panel of the Eleventh Circuit considered itself bound to apply it in *Holman*. See 680 F.2d at 1355-1356 & n.11. And, relying upon *Perez-Hernandez*, the Eleventh Circuit permitted a white male defendant to raise a challenge to underrepresentation of woman and blacks among grand jury forepersons in *Cross*. 708 F.2d at 633-634.

In *Perez-Hernandez* and *Cross*, the Eleventh Circuit has failed to observe the distinction between due process claims such as those discussed in *Peters* v. *Kiff* and equal protection claims such as that advanced here. Nor did the defendants in either case observe that distinction. See 672 F.2d at 1382-1383; 708 F.2d at 632.[1] Because the Eleventh Circuit has failed to consider the distinction between due process and equal protection claims that was the basis for the decision below, there is no necessary conflict between the decision here and the decisions of the Eleventh Circuit upon which petitioner relies —particularly in light of the fact that the decision below strongly suggests that petitioner could have maintained a due process claim had he pleaded and presented his challenge to the indictment on that theory (see Pet. App. 16A-17A, 23A-24A).

The decision below is directly in line with the only other decision of a court of appeals that has addressed the standing issue presented here. In *United States* v. *Coletta*, 682 F.2d 820 (1982), cert. denied, No. 82-798 (Feb. 22, 1983), the Ninth Circuit held that a white male defendant has standing to raise a due process attack upon grand jury

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[1] As noted in our Petition in *Cross* (at 4 & n.6, 11 n.12), it appears that the defendant there did rely at least in part upon a due process theory in challenging his indictment.

foreperson selection, but no standing to complain on equal protection grounds. In opposing the defendant's petition in *Coletta*, which asserted that *Coletta* conflicts with *Perez-Hernandez* on the standing issue, we pointed out, just as we have here, that the Eleventh Circuit simply has failed to consider the distinction between due process and equal protection challenges to grand jury foreperson selection, and has overlooked the inapplicability of *Peters* v. *Kiff* to the latter. There is no more reason to grant further review here than there was in *Coletta*.

We note that the standing of a defendant who is not a member of a class that has allegedly suffered discrimination to raise an equal protection claim is not directly at issue in *Hobby* v. *United States*, No. 82-2140.[2] Conversely, although the district court here reached the issue presented in *Hobby* (see page 4, *supra*), the court of appeals expressly declined (Pet. App. 4A) to reach that issue, while deciding this case on standing grounds. Petitioner therefore could not avail himself of a ruling in *Hobby* supporting his argument (Pet. 14-22) on the merits. Thus, there is no reason to hold this case for disposition in light of *Hobby*.

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[2] *Hobby* presents only the question whether an indictment may be dismissed on the basis of discrimination affecting only the selection of a foreperson from among the members of a properly constituted grand jury. In acquiescing in *Hobby*, we emphasized (Br. 11 n.4) that the petitioner there (also a white male) appears to rely at least in part upon a due process theory; we accordingly have not challenged Hobby's standing to raise such a claim. There is, therefore, no reason to believe that the Court will have occasion in *Hobby* to decide the standing question as it applies to an equal protection claim. Similarly, because the defendant in *Cross* appears to have presented his claim on a due process theory (see page 9 note 1, *supra*), we have elected not to present the standing issue in that case in our Petition, but only to present the underlying issue that is also presented in *Hobby*. Copies of our Petition in *Cross* and our Brief at the petition stage in *Hobby* have been provided to the petitioner.

3. Finally, petitioner suggests that the court of appeals parsed his claim in an unduly strict manner (see Pet. 12, 13). But the court of appeals' appraisal of the gravamen of petitioner's claim, raises no question of general importance. The court of appeals carefully scrutinized the entire record and the appellate briefs, searching in vain for any invocation of due process principles (see Pet. App. 4A-5A & 6A n.3).[3]

Nor does the distinction recognized by the court of appeals between a challenge to an indictment on equal protection grounds and a due process challenge elevate considerations of pleading over substance. The two theories are not interchangeable. The essential basis of an equal protection challenge to discrimination in jury composition was described in *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879) (emphasis added):

> The very fact that colored people are singled out and expressly denied * * * all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is *practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.*

Obviously petitioner can make no claim that he has suffered the injury described by the Court in *Strauder*. On the other hand, the plurality opinion in *Peters* v. *Kiff* recognized the

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[3]It is no answer to observe, as petitioner does (Pet. 12), that he cited *Peters* v. *Kiff* in district court when his standing was challenged (see Pet. App. 47A). Having explicitly denominated his claim as one based on principles of equal protection, the bare citation to *Peters* v. *Kiff* simply reflected misplaced reliance on a due process holding in an equal protection case; it did not serve to transform the claim advanced.

standing of a white male to challenge unconstitutional jury selection practices on due process grounds because it was concluded that the practices challenged there "cast doubt upon the integrity of the whole judicial process" (407 U.S. at 502; see also *id.* at 503-504). While it is our view that neither claim would, in the context presented here, justify dismissal of an indictment returned by a validly constituted grand jury, it is plain that the inquiry to be made by the court is different in the two classes of cases. Petitioner's failure to plead a due process claim accordingly may not be simply overlooked.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]We note that petitioner apparently was indicted by a grand jury with a female foreperson (see Pet. App. 47A). To that extent, at least, his claim of discrimination necessarily would fail if the merits were reached.

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